Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Further Forbearance from	)	
Title II Regulation for Certain	)	GN Docket No. 94-33
Types of Commercial Mobile Radio	)	
Service Providers	)	
	)	
TO: The Commission	)	

COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

Respectfully submitted,

David E. Weisman, Esquire
Alan S. Tilles, Esquire

Its Attorneys

Meyer, Faller, Weisman and
Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
(202) 362-1100

June 27, 1994

TABLE OF CONTENTS

SUMMARY

NABER's position is that overall, the Commission should continue to engage in further forbearance of Title II regulations to the maximum extent permitted and that it should presume the cost benefits derived will not be justifiable when dealing with interconnected private carriers who are now classified as CMRS providers. The Commission can use a number of methods to justify such a determination differentiating between various sizes of CMRS providers to the extent it should require certain Title II provisions to apply.

Taken as a whole, "small" CMRS providers now subject to Title II regulations will be substantially disadvantaged to the extent they must expend funds to meet increased Title II regulatory burdens. Further, the specific benefits intended to be derived to the consumer public by placing such burdens on all CMRS providers would not further the underlying intent of those specific consumer Title II regulations.

NABER is in agreement with the Commission's determination that to the extent regulatory obligations impose fixed costs, they would place a relatively greater burden on small providers who have less revenue base and other resources to import them. Further, to the extent any technical or operational burdens were added to the "fixed costs" aspect of such compliance requirements, they inherently work to the disadvantage of "small" carriers. Further, the Commission should not interpret the classification of "small"

in such a limiting fashion that it only provides for the very small business. Fundamental to this process is that the Commission not foreclose using a number of alternate measurements each of which on their own may be sufficient to allow qualification of a CMRS provider from further Title II forbearance.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Further Forbearance from	)	
Title II Regulation for Certain	)	GN Docket No. 94-33
Types of Commercial Mobile Radio	)	
Service Providers	)	
	)	
TO: The Commission	)	

COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. (**"NABER"**) by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, respectfully submits its Comments in response to the Notice of Proposed Rule Making ("NPRM") adopted by the Federal Communications Commission (the "Commission") on April 20, 1994 and released on May 4, 1994, in the above-captioned proceeding.[1]

I. BACKGROUND

The National Association of Business and Educational Radio, Inc.

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests of large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses and that hold thousands of licenses in the private land mobile radio services. **NABER** has six membership sections representing Users, Private Carrier Paging licensees ("APCP"), radio system integrators, Technicians, Specialized Mobile Radio

---

[1] *59 FR 25432 (May 16, 1994).*

operators and Tower Site Owners and Managers. **NABER**'s membership comprises over 6,000 of these businesses and service providers holding thousands of licenses in the private land mobile services.

For the past 19 years, **NABER** has been the recognized frequency coordinator in the 450-470 MHz and 470-512 MHz bands for the Business Radio Service. **NABER** is also the Commission's recognized frequency coordinator for the 800 MHz and 900 MHz Business Pools, 800 MHz General Category frequencies for Business eligibles and conventional SMR Systems, and for the 929 MHz paging frequencies.

In its *Report and Order* in PR Docket No. 83-737, the Commission designated **NABER** as the frequency coordinator for all Business Radio Service frequencies below 450 MHz and, in a joint effort with the International Municipal Signal Association ("IMSA") and the International Association of Fire Chiefs ("IAFC"), the Special Emergency Radio Service frequencies.

II. **The Commission Proceeding**

In the *Second Report and Order* in General Docket No. 93-252, the Federal Communications Commission decided to forebear from applying Sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any Commercial Mobile Radio Service ("CMRS") provider. In this proceeding, the Commission has issued a Notice of Proposed Rule Making (the "NPRM") requesting comments on whether within particular services classified as CMRS there are types of providers that should be entitled to further forbearance from certain Title II requirements. Starting with the premise that further forbearance in a particular case would not adversely affect

rates or practices or harm consumers, the Commission has identified two (2) additional factors under the public interest test to serve as guidelines in making a determination as to whether or not it should allow further forbearance under Title II. The first criteria is whether there are differential costs of compliance with the remaining Title II sections that would justify further forbearance for particular types of service providers. The second factor is whether the public interest benefits from application of particular Title II provisions are less for certain types of CMRS providers.[2] Accordingly, the Commission has specifically requested that commenters address the benefits of applying the remaining Title II Sections to the costs of complying with such sections and whether the costs of compliance with any of the remaining sections outweigh the benefits received by the public. In the second part of the NPRM, the Commission has asked how it should define CMRS providers for purposes of determining which licensees are permitted further forbearance from Title II regulation.

III. Overview

In its comments to the Commission's proceeding in General Docket No. 93-252, **NABER** emphasized that the legislative history of the Omnibus Budget Bill clearly gave the Commission the right to distinguish among various types of CMRS providers in making its determination as to applicability of Title II regulations. Specifically, the *Conference Report* stated that "differential

---

[2] *NPRM, para 5.*

regulation of commercial mobile services is permissible..."[3] Accordingly, **NABER** supported the reclassification of certain private carriers as CMRS providers under the premise that the Commission would, to the maximum extent possible, forbear from imposing its Title II regulations on such carriers. **NABER** proposed that the Commission subdivide CMRS providers into two (2) classifications recognizing that CMRS providers with significant spectrum allocations be regulated on a different basis from those carriers which held less spectrum and therefore had less of an impact on the overall economic market place. It is **NABER**'s view that implementation of almost any of the Title II regulations on what can be viewed as "small" CMRS providers for forbearance comparisons will result in an unfair or unnecessary economic burden on such carriers and cannot be justified by implementation of additional regulatory paperwork and/or cost.

It is **NABER**'s position in responding to the NPRM that the Commission should allow the maximum amount of forbearance as permitted on what is determined to be "small" or "non-dominant" carriers. The reclassification of private radio systems such as interconnected Specialized Mobile Radio systems, interconnected 220 MHz operators, private carriers who interconnect in the Business Radio Service as well as paging companies for the most part should not be subject to regulations which will only increase their cost of doing business and ultimately disadvantage such providers from

---

[3] *H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993) (Conference Report).*

being able to compete with much larger competitors. Taken as a whole, "small" CMRS providers now subject to Title II regulations will be substantially disadvantaged to the extent they must expend funds to meet increased Title II regulatory burdens. Further, the specific benefits intended to be derived to the consumer public by placing such burdens on all CMRS providers would not further the underlying intent of those specific consumer Title II regulations. The Commission, in making any cost benefit analysis, must view most private radio carriers reclassified as CMRS providers as companies which may be detrimentally impacted both economically and in the competitive environment by having to meet greater regulatory burdens.

NABER believes, therefore, that the presumption should be that overall the Commission should continue to engage in further forbearance of Title II regulations to the maximum extent permitted and that it should presume the cost benefit derived will not be justifiable when dealing with interconnected private carriers who are now classified as CMRS providers. As discussed below, the Commission can use a number of methods to justify such a determination differentiating between various sizes of CMRS providers to the extent it should require certain Title II provisions to apply.

IV. **Specific Title II Sections**

A. Section 210 - Franks and Passes: **NABER** is in agreement with the Commission's conclusion that Section 210 is unrelated to Commission or regulatory obligations. The section allowing common

carriers to issue franks and passes to employees and provide the government with free service in connection with preparation of a national defense appears to ease potential restrictions on carriers. In this respect, **NABER** is in agreement that further forbearance from applying it does not seem to trigger any special concerns or impact on small businesses.

B. Section 213, 215, 218, 219 and 220 - Reservation of Commission Authority: **NABER** fully recognizes that the reservation of authority allows it to retain the right to examine its authority if it so chooses under these sections 213, 215, 218, 219 and 220 of Title II rather than rescinding that authority and thereby having to implement a new rule making if it wishes to invoke the various powers set forth in such sections of the Act. **NABER**, however, believes that the Commission's reservation of authority regarding these regulations should not be viewed as a direct or indirect threat to CMRS providers which raises the prospect that some time in the future the Commission could examine the past operation of a CMRS carrier thus mandating certain types of record keeping on a retroactive basis. The Commission should be very careful that its potential for increased regulation of CMRS providers specifically regarding the filing of annual reports and an inquiry into the management of the carrier and its ownership, not have a "chilling effect" on the way in which CMRS providers conduct their business. Therefore, to the extent the Commission forebears from regulation of these sections, it must make clear that any decision to undertake or utilize such powers would be on

a "go forward" basis only with substantial lead time to enable a CMRS provider to respond and not have to spend inordinate cost, time and expense in revisiting its past activities.

C. Section 223 - Obscene, Harassing, Indecent Communications:

NABER is in agreement as to the importance of the public interest benefits derived in protecting minors adopted in Section 223 of Title II. Further, to the extent CMRS licensees must affirmatively decide to provide such billing services on behalf of adult information providers, it should be only on the basis where the CMRS licensee has knowledge of the requirements of these sections of the Act. Accordingly, where a knowing and voluntarily business decision involving a CMRS licensee is made, a requirement to restrict access by minors and non-consenting persons seems to be a burden that a CMRS licensee would be aware of and could choose to undertake.

D. Section 225 - Telecommunications Relay Services:

It is **NABER**'s view that the benefits to be derived by requiring all CMRS providers to provide TRS and to contribute to the interstate TRS fund would not justify the cost or expense to the carrier. Specifically, the impact of requiring all CMRS providers to provide TRS may create technical, operational and economic issues which create unfair burdens on small carriers. The Commission must acknowledge that the small CMRS provider is in a position that any requirement to engage in the expenditure of funds or an expenditure of time (including administrative and

legal) in the provision of TRS would place it at a disadvantage *vis à vis* larger carriers. Further, the public benefit to be derived from such a requirement is, at best, uncertain.

Alternatively, a requirement that all CMRS operators contribute to the interstate fund for Telecommunications Relay Services may not present an undue burden, provided the economic cost to the carrier is small and provided further that the paper work to calculate such fee is simple. The danger is that the accounting costs required to discern the proper TRS fee, together with the prospect for audit review, could make the process burdensome to many CMRS providers. The calculation of the amount of funding and the actual amount should not result in regulatory burdens that in and of themselves adversely impact CMRS providers.

E. Section 226 - Operator Services: **NABER** would be concerned if the Commission were to impose provisions of the Telephone Operator Consumer Services Improvement Act ("TOCSIA") under Section 226 on all CMRS providers, such a requirement would create added economic costs to the carriers, confuse customers and potentially waste RF capacity.

To the extent CMRS providers are reclassified as Operator Service Providers ("OSP"), it would require that they brand all calls. In order to comply with such a requirement, CMRS providers would have to understand how to classify roamer traffic. The underlying CMRS provider would probably be without sufficient information to make this decision and, in an attempt to comply, would expend unnecessary costs, time and efforts for what otherwise

would be of small benefit to the public. The requirements in TOCSIA which subject an OSP to various identification, disclosure and billing requirements, (including the requirement that they brand, i.e. audibly identify themselves at the beginning of each call), would only result in difficult, if not impossible, burdens on the small CMRS provider. The Commission should forebear from imposing such a burden on most CMRS providers.

F. Section 227 - Unsolicited Telephone and Facsimile Transmissions: The statute does not apply to CMRS providers unless they voluntarily engage in telemarketing or the sending of unsolicited facsimiles or other unwanted communications, thus NABER believes the applicability of TCPA to CMRS should not create an undue burden. Since the CMRS provider would have to act as an originator of an unsolicited voice or facsimile transmission, it would be a voluntary business act by the provider and not necessarily part of what is generally regarded as CMRS.

G. Section 228 - Pay for Call Services: **NABER** is in accord with the Commission's recognition that, on the whole, Telephone Disclosure Resolution Act ("TDRA") would not impose any unfair or unreasonable burden because it affects interexchange carriers. Such carriers assign 900 numbers and CMRS providers do not have the ability to do so. Therefore, CMRS providers would not be subject to the obligations imposed on interexchange carriers. With respect to the local exchange carrier obligation, however, and when viewed against the background of the development of various wireless communication offerings to the public, **NABER** believes that

the Commission should not impose such regulations on smaller CMRS providers until it has a better idea as to the ability and at what cost and expense such carriers will be able to meet the Commission's blocking requirements.

V. CMRS Providers Meriting Further Forbearance

The Commission in Section 3 of its NPRM has requested comment on alternative methodologies for determining those CMRS providers potentially eligible for additional forbearance. In setting forth various alternate cases, the Commission has asked whether the size of the provider may be a basis for determining CMRS eligibility for further forbearance. It has inquired as to whether or not an analysis of a CMRS provider's customer base, as well as its technical or operational limitations, justify such further forbearance.

It has been **NABER**'s longstanding position that the Commission must recognize the differences which exist among various CMRS providers and the need to allow, to the maximum extent possible forbearance from Title II regulations. In its comments in General Docket No. 93-252, **NABER** proposed that the Commission distinguish among classes of CMRS operators based upon the amount of spectrum held or controlled by a licensee. By doing so, the Commission could insure a competitive marketplace and not impose burdensome regulations on a carrier unless that carrier had a significant degree of market dominance measured by the size of the block of spectrum held.

NABER is in agreement with the Commission's determination that to the extent regulatory obligations impose fixed costs, they would place a relatively greater burden on small providers who have less revenue base and other resources to support them. Further, to the extent any technical or operational burdens were added to the "fixed costs" aspect of such compliance requirements, they would inherently work to the disadvantage of "small" carriers. Further, the Commission should not interpret the classification of "small" in such a limiting fashion that it only provides for the very small business. For example, even CMRS providers who operate on a wide area basis or have accumulated a significant number of channels in a market should not be required to automatically undertake such additional Title II administrative and economic costs where the benefits to the public will, in all likelihood, not be great. In this respect, where CMRS providers serve a specialized customer base which has a greater bargaining power, there is no need to impose consumer-type regulations on such carriers.

For purposes of determining "small" for forbearance, it is **NABER**'s view that the size or use of the frequency or spectrum offering held by a carrier are key factors in determining whether such a carrier should be subject to further forbearance. Underlying this determination, however, is the reality that it is also the economic cost and expense to the carrier, *vis à vis* its competitors, which would disadvantage "small" CMRS providers and the economic ability of the carrier to meet such a burden. In light of the Commission's request in Section III of the NPRM, **NABER**

is undertaking to develop more detailed information from its various membership sections to attempt to fashion a proposed consensus of those measurements best suited for the Commission to use in making its forbearance decisions. Fundamental to this process is that the Commission not foreclose using a number of alternate measurements each of which on their own may be sufficient to allow qualification of a CMRS provider from further Title II forbearance.

VI. Conclusion

WHEREFORE, the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission act in accordance with the views expressed herein.

Respectfully submitted,
National Association of Business
and Educational Radio, Inc.

By: _____
David E. Weisman, Esquire

By: _____
Alan S. Tilles, Esquire
Its Attorneys
Meyer, Faller, Weisman and
Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
(202) 362-1100

June 27, 1994